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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DONALD BAXTER,

Petitioner

vs.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
INDIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Was the petitioner denied due process of law by the exclusion at trial of the results of a subsequent, identical polygraph examination offered for the purpose of impeaching the results of an initial polygraph examination conducted and admitted into evidence pursuant to a stipulation by the petitioner and the State of Indiana?

THE PARTIES TO THE PROCEEDING

The parties to the proceeding are those shown in the caption of the case.

TABLE OF CONTENTS

Page

The Question Presented for Review 1
The Parties to the Proceeding 1
Table of Contents 2
Reference to the Opinion 4
Statement of the Ground on which the Jurisdiction of this Court is Invoked 4
Constitutional Provisions Involved 4
Statement of the Case 5
Reasons Relied on for Allowance of the Writ 6

The petitioner's due process right to a fair trial, including the right to confront and cross-examine witnesses and to call witnesses in his own behalf, was violated by a state court in a prosecution for the offenses of rape and criminal deviate conduct, where the results of a subsequent polygraph examination were excluded at trial when offered by the petitioner for the purpose of impeaching and discrediting the results of an initial polygraph examination conducted and admitted into evidence pursuant to a stipulation by the petitioner and the State of Indiana 6

Conclusion 12
Appendix A - Judgment of the Indiana Supreme Court 14
Appendix B - Decision of the Indiana Court of Appeals of April 11, 1983 15
Appendix C - Decision of the Indiana Court of Appeals of February 21, 1983 17

TABLE OF AUTHORITIES

Cases: Page

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 10
Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) 9
Jacks v. State, 394 N.E.2d 166 (Ind., 1979) 9
Kimmel v. State, 418 N.E.2d 1152 (Ind., 1981) 7, 10
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 9
Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) 9, 12
Owens v. State, 373 N.E.2d 913 (Ind.Appr., 1978) 8
Pavone v. State, 402 N.E.2d 976 (Ind., 1980) 7, 8
State v. Dorsey, 539 P.2d 204 (N.M., 1975) 7, 11
Tope v. State, 362 N.E.2d 137 (Ind., 1977) 7
United States v. Havens, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980) 9
Vacendak v. State, 340 N.E.2d 352 (Ind., 1976) 8
Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954) 9
White v. State, 381 N.E.2d 481 (Ind., 1978) 7, 10
William v. State, 375 N.E.2d 226 (Ind., 1978) 11

Miscellaneous:
Constitution of the United States, Fourteenth Amendment, Due Process Clause 4

REFERENCE TO THE OPINION BELOW

The decision of the Indiana Supreme Court, without opinion, appears as Appendix A hereto.

This case came to that Court under the Indiana "transfer" procedure, the petitioner's Petition for Rehearing having been first denied by the Indiana Court of Appeals. (Indiana Rules of Appellate Procedure, Rules AP 11 (A) and (B) .) That decision is attached hereto as Appendix B.

Prior thereto, the Indiana Court of Appeals affirmed the trial court's judgment, which opinion appears as Appendix C hereto. (Indiana Rules of Appellate Procedure, Rule AP 4 (B).)

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the Indiana Supreme Court denying transfer was entered on August 10, 1983.

The decision of the Indiana Court of Appeals denying the petitioner's Petition for Rehearing was entered on April 11, 1983.

The Indiana Court of Appeals affirmed the judgment of the trial court on February 21, 1983.

The Supreme Court of Indiana is the highest court in that State having jurisdiction to review decisions of lower state courts. (Indiana Rules of Appellate Procedure, Rule AP 11 (B).)

This petition for writ of certiorari will be filed within sixty (60) days of the judgment of the Indiana Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States:

14th Amendment, §1:

> "* * * nor shall any state deprive any person of life, liberty or

property, without due process of law
* * *"

STATEMENT OF THE CASE

The action was instituted by the return of a three (3) count indictment on November 12, 1981 against the petitioner, charging him, in Count I, with the offense of Rape, and in Counts II and III with the offense of Criminal Deviate Conduct, all allegedly occurring on October 29, 1981.

Subsequent to the report of the alleged crime but prior to indictment, the petitioner and the State agreed that the petitioner would take a polygraph examination, and that the results would be admitted at the trial of any charges brought against petitioner. The polygraph exam was administered on November 11, 1981 by the Indiana State Police. In the opinion of the polygraph operator, the petitioner showed indications of deception when responding "no" to the following four (4) questions:

1. Last October 29, did you force Nina to have sexual intercourse?
2. Last October 29, did you threaten to beat Nina?
3. Last October 29, did you really rape Nina?
4. Did you tell even one lie to your attorney?

On March 15, 1982, the petitioner submitted to a second polygraph examination conducted by a qualified private polygraph examine. The State did not stipulate and agree, prior to petitioner's submission to this second examination, that the results could be admitted into evidence at petitioner's trial. In the opinion of the examiner conducting the second test, the petitioner was truthful in his answers denying that a forcible rape of the victim occurred.

Prior to trial, the respondent filed a motion in limine seeking a court order that petitioner not introduce into evidence the results of the second polygraph exam. The petitioner also filed a pre-trial motion in limine seeking to exclude the results of the first exam which were unfavorable to him. After hearing and argument, the trial court granted the re-

spondent's motion and denied petitioner's.

Trial to a jury commenced on November 12, 1982. At trial, respondent was permitted to introduce, over petitioner's objection, the results of the first examination. Petitioner offered to introduce into evidence the results of the second examination, however the State's objection to the introduction of that evidence was sustained by the trial court.

On April 22, 1982, the jury returned their verdict finding the petitioner guilty of the offense of Rape as charged in Count I of the indictment. The jury was unable to reach a verdict as to Counts II and III, Criminal Deviate Conduct. On May 24, 1982, the petitioner was sentenced to a term of imprisonment of six (6) years.

Petitioner filed a Motion to Correct Errors (the Indiana prerequisite to an appeal) on July 9, 1982. In it, he cited as error the admission of the first polygraph test results and rejection of the second. Petitioner's motion to correct errors was overruled on July 28, 1982.

Petitioner then prosecuted his appeal to the Indiana Court of Appeals. In his appellant's brief, he once again contended that the trial court's rulings concerning the admissibility of the results of the two polygraph exams constituted an abuse of discretion, and denied him the due process of law as guaranteed by the Fourteenth Amendment.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A state court of last resort has decided federal questions in a way in conflict with decisions of this Court.

The petitioner's due process right to a fair trial, including the right to confront and cross-examine witnesses and to call witnesses in his own behalf, is violated by a state court in a prosecution for the offenses of rape and criminal deviate conduct, where the results of a subsequent, polygraph examination were excluded at trial when offered by the petitioner for the purpose of impeaching and discrediting the results of an initial polygraph examination conducted and admitted into evidence pursuant to a stipulation by the petitioner and the State of Indiana.

It is well settled in Indiana that the results of a polygraph

examination of a witness or a party are inadmissible in a criminal prosecution absent a waiver or stipulation by the parties. *Tope v. State*, 362 N.E.2d 137 (Ind., 1977), *Kimmel v. State*, 418 N.E.2d 1152 (Ind., 1981). (The petitioner recognizes that the decisions of the state courts are not binding on this Court; however, these cases are cited in order to adequately raise the constitutional issues herein.) If such a waiver or stipulation is made, only then does a trial court possess discretion to admit or to exclude polygraph evidence. *White v. State*, 381 N.E.2d 481 (Ind., 1978), *Pavone v. State*, 402 N.E.2d 976 (Ind., 1980).

The Indiana Supreme Court has adopted the following prerequisites for the use of polygraph test results:

> "(1) That the county attorney, defendant and his counsel all sign a written stipulation providing for defendant's submission to the test and for the subsequent admission at trial of the graphs and the examiner's opinion thereon on behalf of either defendant or the state.
>
> (2) That notwithstanding the stipulation the admissibility of the test results is subject to the discretion of the trial judge, i.e. if the trial judge is not convinced that the examiner is qualified or that the test was conducted under proper conditions he may refuse to accept such evidence.
>
> (3) That if the graphs and examiner's opinion are offered in evidence the opposing party shall have the right to cross-examine the examiner respecting:
>
> a. the examiner's qualifications and training;
>
> b. the conditions under which

the test was administered;

c. the limitations of and possibilities for error in the technique of polygraph interrogation; and

d. at the discretion of the trial judge, any other matter deemed pertinent to the inquiry.

(4) That if such evidence is admitted the trial judge should instruct the jury that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged but at most tends only to indicate that at the time of the examination defendant was not telling the truth. Further, the jury members should be instructed that it is for them to determine what corroborative weight and effect such testimony should be given."

Owens v. State, 373 N.E.2d 913 (Ind.App., 1978), *Pavone v. State, supra.* These prerequisites were adopted by the Indiana Supreme Court because, in the Court's opinion, polygraph examinations are basically unreliable and the danger exists that juries will give undue weight to the validity of such examinations. *Vacendak v. State*, 340 N.E.2d 352 (Ind., 1976), *Pavone v. State, supra.*

The petitioner and the State of Indiana entered into a stipulation and agreement for the petitioner to submit to a polygraph examination to be administered by an Indiana State Police Officer. The results of this test were unfavorable to the petitioner. In the examiner's opinion, there were indications that the petitioner was lying when responding to several material questions. Subsequently, the petitioner submitted to a second polygraph examination conducted at his request, but not pursuant to a stipulation with the State of Indiana, by a qualified, private polygraph operator. It was the opinion of

this examiner that the petitioner was telling the truth in his responses to the identical questions that had been asked of him in the previous test. The trial court admitted the results of the initial examination during the State's direct case, but excluded the results of the second examination when offered by the petitioner for the purpose of impeachment.

Although clearly not admissible for substantive purposes as part of the petitioner's direct case, absent a stipulation by the parties, due process of law required that the results of the second polygraph examination be admitted for the limited purpose of impeaching and repudiating the results of the initial examination. An analogy may be drawn to other cases in which the use of otherwise inadmissible evidence is allowable as a basis for impeachment. The Indiana Supreme Court ruled in *Jacks v. State*, 394 N.E.2d 166 (Ind., 1979), that evidence obtained in violation of the Federal Wiretap Statute may be used for impeachment purposes even though inadmissible in the State's case in chief. This Court held that evidence that has been illegally obtained in violation of the Fourth Amendment that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt, may be admitted for the purpose of impeachment. *Walder v. United States*, 347 U.S.62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980). It has been held in numerous cases that statements obtained under circumstances which render them inadmissible to establish the prosecution's case in chief under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.ED.2d 694 (1966), are admissible for purposes of impeaching the accused's testimony at trial. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975). The admission of subsequent polygraph test results, in response to the introduction by the State of the results of a prior, stipulated polygraph test, would not differ from the above-cited cases in which the use of otherwise inadmissible evidence was allowed for impeachment purposes.

The exclusion of the impeaching evidence denied the petitioner his constitutional right to most effectively confront

and cross-examine witnesses testifying against him and to present the best available evidence on his behalf. The nature of the excluded evidence is virtually identical to that admitted, in the trial court's discretion, pursuant to the stipulation of the parties. The key questions asked by the second examiner were the exact questions asked of the petitioner during the first examination. However, the results obtained and interpreted by the two examiners were different.

The sole variable present between the two polygraph examinations is the examiner whose credibility and qualifications are subject to impeachment. With respect to the first examination, the petitioner stipulated to the admissibility of the results, but he did not stipulate to the accuracy or reliability of those results or to the credibility of that particular examiner. *White v. State, supre, Kimmel v. State, supra.* The subsequent test results are probative of the issue of operator proficiency. This impeaching material would provide a valuable aid to the jury in assessing the first examiner's credibility and the benefits of the impeachment process should not be denied the petitioner.

The exclusion of this evidence placed the petitioner in a fundamentally unfair position and he was thus denied due process of law. The nature of the right to due process of law as it relates to state evidentiary rules was considered by this Court in the case of *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The Court reiterated that "(t)he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi, Id.* at 294, 93 S.Ct. 1038, 35 L.Ed.2d 297, 308. It was further recognized that "(f)ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi, Id.* at 302, 93 S.Ct. 1038, 35 L.Ed.2d 297, 312. The circumstantial trustworthiness of the evidence sought to be introduced and the critical nature of the testimony was emphasized. It was held that state evidentiary rules, the cumulative effect of which precluded the accused from introducing

evidence critical to his defense, must fall to safeguard the accused's due process rights.

The New Mexico Supreme Court, following *Chambers*, abandoned its requirement of stipulation as a precondition to admissibility of polygraph results, holding that such a requirement would deny the accused due process of law. *State v. Dorsey*, 539 P.2d 204 (N.M., 1975). All of the safeguards adopted by the Indiana Supreme Court, with the sole exception of the requirement that there be a stipulation by the parties, could be invoked with respect to the admission of the results of the second polygraph examination. This would serve to insure the reliability of the evidence which was of the same nature as the other polygraph evidence admitted by the trial court. An inflexible prerequisite to the admission of the results of a subsequent polygraph examination for impeachment purposes, that there be a stipulation by all parties, virtually precludes an accused from confronting and impeaching the results of an initial test with the contradictory results of an identical subsequent test. It is difficult to imagine the circumstances under which a zealous prosecuting attorney would stipulate to the submission to a second polygraph examination and the admissibility of the results after already obtaining the results desired by him from the initial examination. Such a strict rule in effect prevents an accused from effectively confronting the evidence against him and from adequately defending himself and presenting the best available evidence on his behalf.

The offered evidence was unquestionably critical to the defense as it was probative of the petitioner's intent and relevant to the issue of consent which was the very basis of his defense. The Indiana Supreme Court has expressed its fear that the jury will give undue weight to a polygraph test's validity. *Williams v. State*, 375 N.E.2d 226 (Ind., 1978). This fear is well-founded under the existing evidentiary rules which prevent an accused from effectively confronting and impeaching polygraph test results with evidence of contradictory results obtained in a subsequent identical test. The evidence of the results of the polygraph examination first administered to the petitioner and admitted at trial un-

doubtedly had a significant influence on the decision of the jury. The polygraph examination pertained only to the charged offense of rape and did not touch upon the related charges of criminal deviate conduct; the jury returned a verdict of guilty as to the offense of rape only. It was, therefore, crucial to the petitioner's defense that he be permitted the opportunity to confront this influential evidence with the best impeaching evidence available to him.

A fundamental goal of our legal system is to ascertain the truth. *Oregon v. Hass, supra.* Polygraph examinations which are designed to determine the truth by scientific means are useful as an aid to the jury in its effort to ascertain the truth; however, they are not infallible, as the results are subject to interpretation. Due process dictates that such results must be subject to confrontation and impeachment by contradictory results of an identical examination. Fairness and justice require admission of all reasonable probative evidence available to an accused to prove his innocence. The inflexible rules of exclusion adopted by the Indiana Supreme Court frustrate rather than promote justice and must yield to the basic due process rights guaranteed to the petitioner by the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Indiana Supreme Court.

Respectfully submitted,

JOHN D. CLOUSE
MICHAEL C. KEATING
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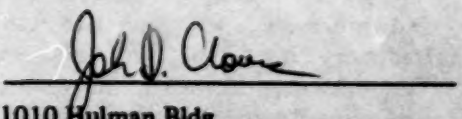
BY 

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APPENDIX A

DECISION OF INDIANA SUPREME COURT ON PETITION TO TRANSFER

IN THE

SUPREME COURT OF INDIANA

DONALD BAXTER, Defendant-Appellant,	)	
vs.	)	NO. 1-882 A 248
STATE OF INDIANA, Plaintiff-Appellee.	)	

APPEAL FROM THE VIGO CIRCUIT COURT

The Honorable Hugh D. McQuillan, Judge

(Cause No. C-CR-81-91)

Appellant's Petition to Transfer is denied, without opinion.

Givan, C.J.

All Justices Concur.

Dated August 10, 1983.

APPENDIX B

MEMORANDUM DECISION OF COURT OF APPEALS OF INDIANA ON PETITION FOR REHEARING

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IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

FILED
Marjorie H. O'Laughlin
APR 11, 1983
Clerk of the
Indiana Supreme and
Court of Appeals

DONALD BAXTER, Defendant-Appellant,	)	
-v-	)	No. 1-882 A 248
STATE OF INDIANA, Plaintiff-Appellee.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable Hugh D. McQuillan, Judge
(Cause No. C-Cr-81-91)

RATLIFF, J.

MEMORANDUM DECISION ON PETITION FOR REHEARING

Baxter argues that this court erroneously upheld the trial court's decision to refuse admission of his independently obtained polygraph test. This test contradicted the results of the polygraph test to which the parties had stipulated and which the court did admit into evidence. Baxter now contends that his independently obtained test results should have been admitted for the purpose of impeaching the earlier test.

We pass no judgment upon the merits of Baxter's argument, because it was not advanced in his original appellant's brief. As Judge Neal succinctly pointed out.

> "Ordinarily, the office of a petition for rehearing is to point out errors the court made in the original hearing. Normally, a question cannot be presented for the first time on a petition for rehearing, nor can a wholly different theory be advanced. *Cunningham v. Hiles*, (1980) Ind. App., 402 N.E.2d 17 (pet. reh.): 2 I.L.E. *Appeals* § 446."

Ellsworth v. Homemakers Finance Service, (1982) Ind. App., 438 N.E.2d 6, 7. An appellant is not permitted to reopen an appeal and reorganize or elaborate his brief upon rehearing. *Jones v. City of Logansport*, (1982) Ind. App., 439 N.E.2d 666, 668.

This argument has been waived.

Petition for rehearing denied.

ROBERTSON, P.J. and NEAL, J., concur.

APPENDIX C

OPINION AND JUDGMENT OF COURT OF APPEALS OF INDIANA

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IN THE

COURT OF APPEALS OF INDIANA

FIRST DISTRICT

FILED
Marjorie H. O'Laughlin
FEB 21, 1983
Clerk of the
Indiana Supreme and
Court of Appeals

DONALD BAXTER,
Defendant-Appellant

-v-

STATE OF INDIANA,
Plaintiff-Appellee.

No. 1-882 A 248

APPEAL FROM THE VIGO CIRCUIT COURT
The Honorable Hugh D. McQuillan, Judge
(Cause No. C-CR-81-91)

RATLIFF, J.

MEMORANDUM DECISION
STATEMENT OF THE CASE

Donald Baxter appeals from his jury conviction of rape, a class B felony. We affirm.

FACTS

Baxter was charged with one count of rape and two counts of criminal deviate conduct. He entered a plea of not guilty and requested a jury trial. The only issue at trial was consent. The jury returned a verdict of guilty as to the rape count but reached no verdict as to the two counts of criminal deviate conduct. He appeals from the conviction and judgment entered thereon.

ISSUES

1. Did the trial court err in refusing to admit an independent polygraph examination which contradicted an earlier polygraph examination whose admissibility Baxter had stipulated to?

2. Was the polygraph test question "Last October 29th, did you really rape Nina?" and its answer erroneously admitted?

DISCUSSION AND DECISION

Issue One

Baxter argues that Indiana should follow the New Mexico Supreme Court and abandon its requirement of stipulation as a precondition to admissibility of polygraph results because such requirement denies a defendant due process of law. We do not agree with Baxter that Indiana's stipulation rule with respect to the admissibility of polygraph tests denies defendant's right of cross examination or to present his own defense. In

Owens v. State, (1978) 176 Ind. App. 1, 373 N.E.2d 913, this court adopted the Arizona Supreme Court's requisites for the results of a polygraph to be admissible. Among those requirements is the opposing party's right to cross-examine the examiner, *Id.* at 915. Furthermore, we cannot accept Baxter's hypothesis that "the polygraph results excluded by the trial [c]ourt must be considered to be reliable and trustworthy since the trial [c]ourt admitted the results of the first polygraph examination." Appellant's brief at 13. The trial court's exclusion of the second examination did not prevent him from preparing his own defense. He was not required to stipulate to the first polygraph examination, and there is no evidence he did not do so knowlingly or willingly.

As a general rule the results of polygraph examinations are not considered sufficiently reliable to be admissible in a criminal trial absent a waiver or stipulation by the parties. *Dean v. State*, (1982) Ind., 433 N.E.2d 1172, 1181, *suppl.* 441 N.E.2d 457; *Kimmel v. State*, (1981) Ind., 418 N.E.2d 1152, 1157, *cert. denied* U.S., 102 S. Ct. 430. Only if such stipulation is made does the trial court have the discretion to admit or exclude such evidence. *Dean; Pavone v. State*, (1980) Ind., 402 N.E.2d 976, 979. In this case there was no stipulation as to the admissibility of the second polygraph test as there was with the first. Had the court admitted such evidence in the absence of such stipulation it would have erred. *Owens*. The trial court did not err, therefore, in excluding the second polygraph examination in the absence of proper stipulation.

Issue Two

Citing no authority for his position, Baxter claims that it was error for the trial court to admit over his objection the question posed by the polygraph examiner, "Last October 29th, did you really rape Nina?" and its answer. The basis for his contention is that the answer given is a question of fact to be determined solely by the jury. The state points out that Indiana courts have held that where a valid waiver as to the

results of a polygraph test exists, it is an "express waiver of any and all objections to the use of the test results. . . ." *Taylor v. State*, (1980) Ind. App., 409 N.E.2d 1246, 1250, *Trans. denied.*

Judgment affirmed.

ROBERTSON, P.J. and NEAL, J., concur.